No. 21,764

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

O'KEEFFE ELECTRIC COMPANY,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR RESPONDENT

DAVID A. NORWITT,
1255 Post Street,
San Francisco, California 94109,
Attorney for Respondent.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 21,764

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

O'KEEFFE ELECTRIC COMPANY,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR RESPONDENT

JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD

The Board is empowered, as hereinafter provided, o prevent any person from engaging in any unfair abor practice (listed in section 158 of this title) af- ecting commerce, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 160.

Where an employer's business is local in character, he question whether the Board has jurisdiction is ependent on whether the employer's activities bear uch close and intimate relation to interstate com-

merce, or has such a substantial economic effect on commerce, that a work stoppage in the employer's business because of a labor dispute would tend to impede, burden or obstruct interstate commerce or the free flow thereof. *N.L.R.B. v. Conover Motor Co.,* C.A. 10 (1951) 192 F. 2d 779; *N.L.R.B. v. New York State Labor Relations Board,* D.C.N.Y. (1952) 106 F. Supp. 749.

It is respondent's contention that under the facts and circumstances of this case the Board has erred by assuming jurisdiction over the respondent. The relation to interstate commerce and the economic effect on such commerce of the business activities of respondent do not reach a level where it can reasonably be held that the Board can assume jurisdiction over the respondent. It is true that the amount of commerce affected is not the standard by which the Board's jurisdiction is measured unless the volume of commerce that might be affected is so slight as to bring into play the maxim *de minimis. N.L.R.B. v. Townsend,* C.A. 9 (1950) 185 F. 2d 378, certiorari denied 71 S. Ct. 621, 341 U.S. 909, 95 L. Ed. 1346; *J. L. Brandeis & Sons v. N.L.R.B.,* C.A. 8 (1944) 142 F. 2d 977, cert. denied 65 S. Ct. 85, 323 U.S. 751, 89 L. Ed 601, rehearing denied 65 S. Ct. 129, 323 U.S. 815, 89 L. Ed. 648. The amount of commerce affected in this case does call for the application of the maxim *de minimis* rule. When the volume of commerce that might be affected is so slight, then the maxim *de minimis* can be raised. *N.L.R.B. v. Townsend,* supra

The respondent is a small corporation located in San Francisco (value of assets at close of fiscal 1965 $49,106.00) which engages in electrical contracting, ventilating, refrigeration and maintenance servicing to various businesses in the San Francisco Bay Area. No income is derived from services rendered outside the State of California. The total purchases of respondent for all material used in its operations for the fiscal year of 1965 was approximately $33,000.00. The number of employees of respondent generally does not exceed six people. (TR. 261.) The commerce clause cannot be pushed so far as to destroy the distinction between what is solely within the domain of the states and what is subject to federal control. *N.L.R.B. v. Jones & Laughlin Steel,* 301 U.S. 1, 30, 57 S. Ct. 615, 81 L. Ed. 893, 108 ALR 1352.

Petitioner relies on the membership of Fischbach and Moore, Incorporated, a New York Corporation, in the San Francisco Electrical Association, Inc., to establish jurisdiction of the Board. (TR. 4-5.) The annual gross volume of this corporation for services performed in California exceed $1,000,000.00, and it annually purchases goods in excess of $50,000.00, which are shipped to the office in California from outside the State. In addition this New York corporation is a party to a collective bargaining agreement with Local No. 6 of the International Brotherhood of Electrical Workers, AFL-CIO, covering inside wiring work. (TR. 8-9.) Respondent's position is that it is not valid to join the business activities of the members

of the San Francisco Electrical Association with those of respondent to empower the Board to assert jurisdiction over respondent herein. *Pearl Beer Distributing Co. v. N.L.R.B.* (C.A. 5) 331 F. 2d 301, cert. denied, 379 U.S. 830. It is not disputed that the maintenance men only are those with whom this proceeding is exclusively concerned as Petitioner stated on page 3 of its brief. As stated above the bargaining agreement with Local No. 6 covers only inside wiring work and not the work done by the maintenance men who are under concern here. A dispute concerning these men could not involve the Association because the bargaining agreement with Local No. 6 covered only the wiremen. It is respondent's contention that it is incorrect to utilize the volume of commerce done by any of the Association members, save of course the respondent, in determining whether the labor dispute would, if a work stoppage occurred, tend to impede, burden or obstruct the free flow of interstate commerce. Local No. 6 would have no grievance against the Association for the alleged unfair labor practice of the respondent because of the lack of a bargaining agreement covering maintenance employees between the Association and Local 6. Respondent respectfully submits that without the inclusion of the other members of the Association, the effect of the labor dispute concerned herein with respondent would fall within the area covered by the *de minimis* rule, and that the Board erred by exercising its jurisdiction in this matter on the basis of the inclusion of said members of the Association.

STATEMENT OF FACTS

Respondent is a very small closely-held corporation whose principal stockholders are Mr. and Mrs. William F. O'Keeffe, Sr. William F. O'Keeffe, Jr. is the manager. The physical plant of respondent is located in San Francisco. It engages in servicing and maintaining fans, ventilating systems, electric motors, air conditioning and refrigeration systems and various types of small appliances. (TR. 10-13.)

The employees of respondent are divided into two classifications. The journeymen wiremen who were covered at all times by a contract with Local 6 and who are not under concern in this matter. The second group are seven maintenance men who were laid off on February 24, 1965, and at that time were covered by an agreement with Sheet Metal Production Workers' International Association, Local Union No. 355. Five of this latter group's activity to join Local 6 by signing authorization cards for that union on the day before their termination represents the grounds upon which Petitioner bases its allegation that respondent violated Section 8(a) (3) and (1) of the National Labor Relations Act, as amended.

Prior to the end of 1963, respondent had its maintenance employees covered by a "Motor Shop Agreement" with Local 6. Although the said agreement expired at the end of 1963, respondent continued to hire through Local 6 until a new contract was signed with Local 355 in August of 1964, to cover respondent's maintenance employees. (TR. 172 and 178-179.)

Sometime in June of 1964 Richard F. Dewey wa hired by respondent. Even though the contract cove ing maintenance employees with Local 6 had expire at this time, Mr. Dewey was sent to Local 6 for clea ance as a maintenance man, but the Union refused t clear him. (TR. 37.) However, this man was em ployed by respondent. Subsequently, Richard Dewe Jerson H. Hernandez, Gary M. Walters, Gary M Cliff and Wilfred Davies became members of Loc No. 355. (TR. 180-182.)

During the early part of February, 1965, Richar Dewey was working on a job for respondent at R viera Furniture Company when he was approached b a business representative of Local 6, and was told t leave the job because Dewey was not a member Local 6 and the type of work he was performing wa covered by the contract with respondent. Mr. Dewe was promptly removed from the job site and a wir man member of Local 6 was substituted. (TR. 38-4 TR. 122-123.)

On two occasions after this incident involving Ric ard Dewey, but prior to February 24, 1965, Dewe Gary Cliff, Wilfred Davies and Gary Walters on o occasion, and these four plus employee Hernandez the second instance had discussions at the respon ent's shop in the rear of the building. These tal concerned the possibility of all becoming members Local 6. Other than these aforementioned five me no one was present during these conversations. (T

104, 115, 147-148.) After one of the said conversations the respondent's bookkeeper and office manager, Dan Martin, passed by the back office where the aforementioned employees were gathered, and he was asked by either Mr. Cliff or Mr. Dewey what he thought about them joining Local 6. Mr. Martin did not give a specific answer, but only said that he did not know what would happen. (TR. 105, 116-117, 148-149.)

On February 23, 1965, the following maintenance employees of respondent signed authorization cards to have Local 6 represent them: Dewey, Hernandez, Cliff, Walters and Davies. (TR. 102, 113-115, 146, 158-159.) It also happened that on the following day William O'Keeffe, Jr. had a meeting with his father in regard to the critical financial situation that respondent was suffering at that time. The problems discussed between the O'Keeffes on February 24, 1965, included the desperate cash position of the company, the slow collection of the accounts receivable, and why certain jobs were taking longer than anticipated. It was decided at this meeting that respondent had to terminate every employee except Mr. Moniz who was a key man and one wire man who was needed to complete the only contract job so collection on the contract could be made. On the afternoon of February 24, 1965, seven maintenance employees were laid off and were told that the company was having financial problems and that they would be contacted when the problems had been dealt with. (TR. 55-60.)

ISSUES

I

Is the Board's determination that respondent had knowledge of the employees' union activity prior to February 24, 1965, supported by substantial evidence?

II

Is the Board's determination that respondent terminated its employees because of their union activities supported by substantial evidence?

I

One of the required elements that must be proved in order to show that a violation of Section 8 (a) (3) of the National Labor Relations Act, as amended, has occurred is that the respondent had notice of the employees' union activity prior to the discharge of said workers. National Labor Relations Act, 8 (a) (1, 3) as amended 29 U.S.C.A. 158 (a) (1, 3). *N.L.R.B. v. National Paper Co.* (1955), 216 F. 2d 859, *N.L.R.B. v. Ace Comb Co.* (1965), 342 F. 2d 841. The respondent argues that it did not have such notice.

Mr. William O'Keeffe, Jr. testified that he first obtained knowledge that some of the employees had authorized Local 6 to represent them when the National Labor Relations Board notified respondent by mail several weeks after February 24, 1966 (TR. 34). However, Mr. O'Keeffe, Jr. did make a personal attempt on behalf of respondent to have Mr. Richar

Dewey cleared by Local 6 in June of 1964. (TR. 36.) William O'Keeffe, Jr. states having obtained no nowledge either directly or through his office manger, Dan Martin, that the employees were discussing he possibility of talking to a Local 6 representative. TR. 45-46.) O'Keeffe, Jr. did not even hear of any umors of the union activity by the employees prior to he layoff. (TR. 54.) Also, the testimony of Gary Valters, Richard Dewey, Gary Cliff and Jerson Iernandez is that O'Keeffe, Jr. did not learn of the nion activity prior to February 24, 1965, from any ne of them. (TR. 106-107; 110; 153; 163.)

Also in the case of O'Keeffe, Sr. the respondent eceived no notice of the employees' union activities r even that they were contemplating joining Local prior to the layoff of the maintenance men. (TR. 57-260.)

In regard to the possibility that O'Keeffe, Jr. arned of the union activity from Dan Martin, office anager, prior to the layoff, the record reveals that ne statement prepared by the investigator, Mr. Brand, was not a totally true and correct representaon of what Mr. O'Keeffe, Jr. related to Mr. Brand. he information that O'Keeffe, Jr. received about the ctivity to join Local 6 did not come to him until *fter* the layoff in a conversation he had with Mr. Iernandez. (TR. 92-94.)

Petitioner, on page seven of its brief, partially ases its argument that respondent knew of the union ctivity prior to the layoffs on the conversation be-

tween Richard Dewey and William O'Keeffe, Jr. o
March 26, 1965. This conversation took place on
month after the layoff date and it does not indicat
what date Dan Martin informed O'Keeffe, Jr. of th
conversations he overheard. The only reasonable in
ference that could be drawn from this is tha
O'Keeffe, Jr. was told by Martin subsequent to th
layoffs because O'Keeffe, Jr. told Dewey in this con
versation "if I would have known you wanted to go t
the Union, I would have taken you down personall
and signed you up." (TR. 125-126.) This is com
pletely credible because it is undisputed that Mr
O'Keeffe, Jr. had previously taken Mr. Dewey dow
to Local 6 to be cleared but was unsuccessful. (TR
117.) In addition the petitioner, on pages six an
seven of its brief, in part bases its agreement tha
respondent had knowledge of the union activity prio
to February 24, 1965, on the telephone conversatio
between William O'Keeffe, Jr. and Jerson Hernande
This conversation was held sometime during the firs
week of March, 1965. Mr. Hernandez said "I didn
think the Company had financial troubles," an
O'Keeffe, Jr. answered by saying, "I was left with n
alternative. . . ." O'Keeffe also said that if there ha
been somebody that wanted to talk to him about i
he would have explained the whole problem. (TR
161-162.) Also O'Keeffe asked Hernandez why h
did not tell him about his planning to join Local
(TR. 163.) It is Mr. Hernandez testimony that M
O'Keeffe, Jr. personally took him down to Local
when he began working for respondent and that h

had no difficulty becoming a member of Local 6 (TR. 65.) The conversation does not indicate in any way that O'Keeffe, Jr. had notice of any discussions among the men as to their joining Local 6, or that any of the employees had signed authorization cards on February 23, 1965, at the Local 6 meeting Hall. Rather, the conversation indicates that O'Keeffe, Jr. was referring to the financial problems of the respondent when he told Mr. Hernandez that he had no alternative but to lay the men off because the reply of O'Keeffe was to the statement by Hernandez that he did not believe the company was having financial difficulties. Further in the conversation O'Keeffe stated that if he had known about the discussions, he could have explained everything to the men. This is one more example of O'Keeffe's lack of knowledge prior to the layoffs that the maintenance men were discussing the possibility of joining Local 6.

An additional base on which petitioner relies for his argument that respondent had notice of the union activities before the layoffs are two references made by William O'Keeffe, Jr. that the employees were going behind his back, or that something was going on behind his back. (TR. 125-126; 161-163.) An explanation of what Mr. O'Keeffe, Jr. meant when making these references is found in the testimony regarding an incident involving Richard Dewey and Mrs. Etta Wallace Townsend at her beauty salon in Berkeley. Mr. O'Keeffe, Jr. received a telephone call from Mrs. Townsend two days after the layoffs and she

said that Mr. Dewey had told her the job in progress at her shop would be shut down. (TR. 215-218.) In the subsequent conversation with Richard Dewey in March of 1965 O'Keefe, Jr. referred to Mr. Dewey doing something behind his back and in his testimony O'Keeffe stated that the reference was to Dewey's activity with Mrs. Townsend and to other job sites that Dewey visited that same day. (TR. 219.)

The petitioner imputes the knowledge that Dan Martin obtained by overhearing the employees' conversations regarding Local 6 prior to the layoff date to the respondent. It is not disputed that Mr. Martin is an employee of the respondent corporation and that there exists a principal agent relationship between Martin and respondent. However, not everything that is witnessed by the agent is imputed to the principal. It must also fall within the agent's duty and scope of employment. In general the rights of a corporation are not affected unless notice to an officer or agent of the corporation is in regard to a matter coming within the sphere of the agent's duty while attending the business of the corporation. Respondent contends that Dan Martin was not acting within the sphere of his duties for the respondent while he was listening in over the intercom system to the maintenance men, and the information so obtained is thus not imputable to respondent in any degree. *Ohio Farmers Indem. Co. v. Charleston Laundry Co.* (1950), 183 F. 2d 682. A principal is not bound by agent's knowledge acquired while acting outside course of employment for principal. *Hooker v. New Amsterdam Gas Co.* (1940)

33 F. Supp. 672. It must be shown that the agent at some time had duties to perform on behalf of the principal with respect to the transaction, in order to impute knowledge of the agent to the principal in a particular transaction. *Dawn Donut Co. v. Hart's Food Stores, Inc.* (1959), 267 F.2d 358. At no time has evidence been introduced to show that part of Dan Martin's duties was to eavesdrop on conversations of other employees and report to respondent.

Respondent argues that it had no actual or constructive notice of the employees' union activity prior to February 24, 1965.

II

A second element that must be proven before a violation of Section 8 (a) (3) of the National Labor Relations Act, as amended, is found is that the respondent discriminatorily terminated its employees because of their union activities. National Labor Relations Act, Sections 7, 8 (a) (1, 3) as amended by Labor Management Relations Act (1947), 29 U.S.C.A., Sections 157, 158 (a) (1, 3). *N.L.R.B. v. Ford Radio & Mica Corp.* (1958), 258 F.2d 457 and *N.L.R.B. v. Mira-Pak, Inc.* (1965), 354 F.2d 525 and *N.L.R.B. v. Rish Equipment Co.* (1966), 359 F.2d 391. The respondent urges that the Board's determination that it laid off the maintenance men because of their union activities is not supported by substantial evidence.

As previously expressed herein the respondent ha made at least two attempts to obtain clearance for it maintenance men in Local 6, and thus has demon strated its desire to have its employees in that unio although the union on both occasions refused to ac cept the applicant. (TR. 37, 117, 131, 165.)

Around the middle of December, 1964, a meetin was held between officials of Local 6 and responden wherein the union demanded that respondent dis charge all of its maintenance men who were covere by a contract with Local 355 at that time because o an alleged contract covering these same men wit Local 6. Respondent refused to discharge any of it employees and denied that any contract existed i regard to the maintenance men. Respondent denie that the signature on the alleged contract was that c any representative of the respondent. (TR. 242-243.

Petitioner partially bases its argument that the lay offs were discriminatory by showing that responde hired an employee to replace Richard Dewey; that o February 26 or 27, 1965, respondent rehired employe Beurnez; and that respondent hired new employe "off the street" and not through Local 355 where t employees who were laid off had signed an out-o work list. A wireman was hired to replace Richa Dewey but that was only to finish one job that w already in progress. (TR. 248.) Mr. Beurnez w rehired because he had come back to the respondent shop a few days after the layoffs and inquired abo being rehired (TR. 20) and respondent was in ne

of one man to service part of the routes that was previously handled by Beurnez and Walters, i.e. to at least take care of the oldest, most important customers. (TR. 207.) Messrs. Walters and Hernandez were both called on February 26, 1965, before Beurnez was rehired to do the more important service routes. (TR. 207.) The payroll records demonstrate that the men hired after February 24, 1965, were not hired to replace those who were laid off but the new employees performed different tasks or were employed for very brief periods of time. On March 1, 1965, Ivan Amador was hired for three days. (GC. 5.) On March 17, Lauren Eckhoff was hired to do refrigeration installations which none of the men laid off was qualified to perform (GC. 10.) On March 22, Dennis Kelly was employed for two weeks. (GC. 7.) Beginning May 10, 1965, Henry Atwood was employed for only three weeks (GC. 14), May 24, 1965, Dan Todd was hired to do refrigeration installations to replace Eckhoff (GC. 20). Starting in June of 1965, Thomas Hearty, refrigeration man was employed for seven weeks (GC. 16), and Art Moniz, Jr. was hired for two weeks on August 23, 1965 (GC. 17). The record amply shows that the new employees were of a temporary nature or did the type of work that the maintenance men were incapable of performing. Before respondent placed an advertisement in the newspaper, O'Keeffe, Jr. called Local 355 about the middle of March and asked if they had anyone available, and they did not have. (TR. 99-100; TR. 208-209.)

Mr. Beurnez was the only employee who contacted the respondent after the layoffs and who wished to be rehired. (TR. 20.)

Petitioner argues that respondent wanted its maintenance men to be members of Local 355, rather than Local 6, because of the lower wage rates required by Local 355. The record does not support this contention. As an example of the indifference of respondent to Local 6 or Local 355, Mr. Hernandez' case was used at the hearing. He was paid the same wage scale provided for in the Local 6 contract even though he was a member of Local 355 and O'Keeffe, Jr. testified that it made no difference to respondent or to him, whether the employee was in Local 355 or in Local 6. (TR. 189.) Both Dewey and Hernandez were taken to Local 6 for clearance but were refused. This is further evidence of respondent's willingness to have its employees become members of either local, and dispels the contention that respondent preferred one union over the other. The refusal of Local 6 to clear Dewey in mid-1964 left respondent with little choice but to seek other union coverage for Mr. Dewey and other employees who were in the same position as Dewey. Respondent had always been a union shop and O'Keeffe, Jr. was very definitely interested in keeping the union coverage. (TR. 176.)

Petitioner alleges animus on the part of O'Keeffe, Jr. toward Local 6 because of its refusal to clear Richard Dewey. It cites a telephone conversation between O'Keeffe, Jr. and an official of Local 6, M. Ziff, and the remarks of Mr. O'Keeffe, Jr. after the

onversation to the effect that respondent doesn't eed the union and respondent will go non-union. TR. 119-120.) It is a reasonable reaction to an emoional and highly personal situation that involved 'Keeffe, Jr. because he had himself requested Local to clear his friend, Richard Dewey, and was flatly efused. The ensuing developments show that these emarks were only the result of momentary anger. ometime during the following month, O'Keeffe, Jr. tated that he did not wish respondent to go nonnion and because of Local 6's refusal to clear Dewey, was decided to contract with Local 355 to obtain nion coverage for the maintenance men. (TR. 121, 76-180.)

It is respondent's contention that the layoffs of 'ebruary 24, 1965, were unavoidable and due exlusively to the dire financial situation in which espondent found itself on that date. The activity of ie maintenance men prior to the layoffs to join ocal 6, even if such was known to respondent, was ot the reason for the layoffs. The liquidity of reondent had reached the emergency level which lled for drastic measures to keep the business from ping under. It is not denied that respondent had xperienced financial problems prior to February 24, 965, but not to the degree that was present on that ate. The key money problem was that in February f 1965, respondent had to borrow for the purpose of eeting the payroll and daily operating expenses hich it had not had to do in the past. Previous loans ere obtained to meet capital expenditures and other

long-term debts but never to meet the weekly payro and operating expenses. (TR. 261-263.) This wou of course alarm the O'Keeffes and they held a emergency meeting on February 24, 1965, to discu these pressing financial problems. (TR. 57-59.)

Petitioner argues that respondent's contention tha it laid off the employees because of a cash shortag is without validity because of the respondent's n profit, assets and surplus through the years 1961-196 show that respondent's surplus position had been fa worse in previous years when it had not laid off i employees en masse. (GC. Exh. 26-30 and TR. 27 272.) However, the cited exhibits cover a yearl period and the periodic emergency financial difficulti are not reflected therein. The dire liquidity positio of the respondent which came to light in late Febru ary, 1965, would be buried in the yearly totals and th reason for the mass layoff could be revealed onl upon a close scrutiny of the respondent's finances a that particular point. It would be quite reasonable t assume that the respondent's net profits, assets an surplus position would be markedly different if th employees were not laid off, and only a few ar temporary men were hired for the balance of 196

Respondent had borrowed $3,000.00 from a bar on February 18, 1965, and on February 24, 1965, r spondent's bank account was already overdrawn. (Tl 22-23.) The purpose of the loan was to give respon ent time to retrench and obtain some breathing spa to collect the many outstanding receivables and ke the business going. Respondent had never borrow

ıoney for this purpose previously. (TR. 259-263.) Understandably, this sudden loss of cash for operating osts caused O'Keeffe, Sr. to have an immediate meetıg with his son about this situation, and how it could e remedied. The prospects for increased income ırough increased collection of moneys due respondent or work in progress or already completed was very ılikely in view of dissatisfaction of many of respondıt's customers with the work done, and several of ıe larger jobs were entering the litigation stage. (TR. 63-264.) It was not unusual for respondent to lay off ıree or four men at a time when the work was slow. TR. 271.) On February 24, 1965, the two O'Keeffes iscussed at great length what would be necessary to olve the financial problems that had reached such a ritical stage. It was decided that the work crew of aintenance men had to be cut drastically and that 'Keeffe, Sr. would go around and examine the jobs ı progress and negotiate settlements with the disıtisfied customers and attempt to increase the inflow cash. The situation was abnormal for respondent ıd this was the first occasion that it had to borrow cover the day-to-day operational expenses. (TR. 61-262.) Even after obtaining the loan on February 3, 1965, there was not enough cash remaining at the ıd of February to meet the next week's payroll. (TR. 9-60, TR. 204.) The motivating force behind the layffs was the acute financial distress that left respondıt with no choice but to drastically reduce its work orce.

ARGUMENT

The Board's determination that respondent dis charged the employees because of their union activity is not supported by substantial evidence. It is undis puted that the employees under concern were laid of on the day following the signing of authorizatio cards, but this fact by itself would not be sufficien to hold that they were discharged because of thi activity. There is no direct evidence that responden had knowledge of this activity prior to the layoff either from any of the employees or from Dan Martin There is in the record testimony that Mr. Marti overheard some conversations of the employees abou the possibility of joining Local 6, but there is a lac of any testimony that Mr. Martin relayed any suc information to either O'Keeffe prior to February 24 1965, although the information may have been give to O'Keeffe at a time subsequent to the layoffs. (TR 125-126.) Also the knowledge of Martin is not im puted to respondent on an agent-principal law basi because he was acting wholly outside his function on behalf of the respondent. The testimony of bot O'Keeffes is that it made no difference whether th maintenance men were covered by Local 6 or Loca 355, but the circumstances were such that Local 6' refusal to clear maintenance men left respondent wit no alternative but to seek other union coverage. Th cash position reached a critical stage on February 2 1965, when the receivables collections were laggin far behind normal, and a loan of $3,000.00 which wa received on February 18, 1965, was already mostl utilized to meet current expenses. This extreme sitt

tion had never occurred in the company's past istory. The employees that were hired after Febru- ry 24, 1965, were on a temporary basis only and were ut on the payroll to perform the vitally necessary obs. (GC. 7, 10, 14-17.) Respondent called Local 355 o obtain these temporary replacements but without uccess, so it put an advertisement in a San Fran- sco newspaper. Calls were made by respondent to me of the laid-off employees but only Beurnez re- ponded and said that he wished to return to work. n a statement taken by an investigator, Mr. Brand, it is urged by petitioner that O'Keeffe, Jr. admitted t Hernandez and Dewey that the reason for laying f the employees was their going behind O'Keeffe's ck and joining the union. As the record shows, this rt of the statement was unequivocally denied by Keeffe as an incorrect representation of what was id to Mr. Brand, and also it shows that the reference t going behind O'Keeffe's back was to the activities o Richard Dewey with the customers of respondent immediately after the layoffs.

For the reasons stated it is respondent's contention tat it did not lay off any employee because of their nion activity, but solely because of the perilous financial condition of respondent at that time and it respectfully requests that the Board's order be re- versed and the matter dismissed.

Dated, San Francisco, California,
October 12, 1967.

DAVID A. NORWITT,
Attorney for Respondent.

Certificate of Counsel

I certify that, in connection with the preparatio of this brief, I have examined Rules 18, 19 and 3 of the United States Court of Appeals for the Nint Circuit, and that, in my opinion, the foregoing bric is in full compliance with those rules.

David A. Norwitt,
Attorney for Respondent.